IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.507 OF 2007

Kondiba Mahadev Powar .. Appellant.
Vs.
Appa Dattu Khochge & Ors. .. Respondents.

Mr.P.D.Dalvi for the appellant.
Mr.Amit Borkar for respondent nos.1 and 4.

CORAM : D.B.BHOSALE, JJ.
DATED : 2ND AUGUST, 2007.

P.C.:

. Heard learned counsel for the parties.

2. This second appeal is directed against the judgment and order dated 11.11.2005 rendered by the first appellate court by which the appeal has been allowed and the judgment and decree passed by the learned Joint Civil Judge, Junior Division in Regular Civil Suit No.788/1976 dated 29.11.2004 has been set aside. The appellant-plaintiff had filed a suit for declaration and injunction on 16.7.1976. The injunction or ad-interim injunction, as prayed, was not granted by the trial Court. In 1990, the plaintiff amended the suit and prayed for partition and separate possession of his share in the suit property bearing Gat No.79.

3. The trial Court had decreed the suit

declaring that plaintiff no.2 has 1/16th share in the suit property and he is entitled for partition and separate possession thereof. It is against this judgment defendant no.3 filed the first appeal. The first appellate court has answered the point of limitation in favour of defendant no.3 holding that when the suit was filed, it was within limitation and, prayer for partition and separate possession inserted by way of amendment in 1990 is time barred.

4. Mr.Dalvi, learned counsel for the appellant vehemently submitted that the plaintiff was in possession of the suit property and he was dispossessed therefrom, in June, 1982. Insofar as possession of the suit Gat number is concerned, the finding on fact is that defendant no.3 was initially in possession of the suit Gat as a tenant and he purchased said land on 18.2.1976 by registered sale deed executed by defendant no.1 in his favour. Since 18.2.1976 defendant no.3 is in possession of the suit Gat. Keeping this finding of fact in view I examined the point of limitation. The suit was filed on 16.7.1976 in which a clear averment was made by the plaintiff which show that he was aware about the sale deed executed by defendant no.1 in favour of defendant no.3 on 18.2.1976. Admittedly, injunction was not granted in favour of the plaintiff by the

trial court and the prayer for partition was added by way of amendment in 1990. In view thereof the appellate court in paragraph 22 and 23 has observed thus:

> "22. While deciding the issue of limitation court has to consider the averments in the plaint. Initially the suit was filed for declaration of their share in the suit land and for consequential relief of perpetual injunction. According to the plaintiffs defendant No.3 started obstructing their possession in the year 1975-76. So the initial suit fled by the plaintiff for declaration and injunction was filed well within limitation.
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> 23. In respect of partition and separated possession the plaintiffs came with a plea that they are dispossessed in the month of June 1982. But evidence on record clearly shows that the plaintiffs were not in possession since 1975. The amendment was made for partition and separate possession on 23.8.1990 i.e. after 15 years. Considering the nature of the amendment this amendment does not relate back to the date of presentation of the suit, but it becomes effective from the date of amendment. In fact the plaintiffs were not dispossessed during the pendency of the suit. But before the filing of the suit they were not in possession. It was necessary for them to file the suit within the period of 12 years, but they sought the relief of partition and dispossession after the period of 15 years. So the prayer of the plaintiffs for partition and separate possession is time barred. I record my finding on issue no.7 that initially the suit was filed by the plaintiffs well within limitation, but their prayer for partition and separate possession is time barred."

5. Mr.Dalvi, learned counsel for the appellant submitted that the case of ouster was not pleaded by

the defendants. Upon perusal of the plaint it is clear that the plaintiff himself had stated that the sale deed was executed in respect of suit Gat in 1976 itself which clearly shows that he was excluded from the said Gat number and, therefore, he ought to have instituted a suit to enforce his right to share therein. The exclusion was within his knowledge right from the date when he filed a suit. Thus the suit has rightly been held to be barred by limitation with reference to Article 110 of the Limitation Act, 1962. That apart, admittedly, the joint family has several properties, while the partition was sought only in respect of Gat No.79 which is not sustainable in law. The plaintiff ought to have added all the properties of the joint family in the suit. In my opinion the findings of fact recorded by the appellate court are based on the entire evidence on record. No substantial question of law is raised in this appeal. The second appeal is dismissed.

(D.B.BHOSALE, J.)